Supreme Court U.S.
FILED

001231 JAN 29 2001

No. 00- (1)

IN THE
# Supreme Court of the United States

CHARLES SIMMONS, Secretary,
Kansas Department of Corrections,
*Petitioners,*

v.

MARVIN W. JOHNSTON
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

TIMOTHY G. MADDEN
*Chief Legal Counsel*
Kansas Department
of Corrections
900 S.W. Jackson
Topeka, KS 66612-1284
(785) 296-3317

CARLA J. STOVALL
*Attorney General*
STEPHEN R. MCALLISTER
*State Solicitor*
(Counsel of Record)
120 S.W. 10th Avenue,
2nd Floor
Topeka, KS 66612-1597
(785) 296-2215

*Counsel for Petitioners*

42 pp

## QUESTION PRESENTED

Whether the revocation of correctional institution privileges violates the Fifth Amendment's privilege against self-incrimination where the inmate has no liberty interest in the lost privileges and such revocation is based upon the inmate's failure to accept responsibility for his crimes as part of a sex offender treatment program?

## TABLE OF CONTENTS


Page

QUESTION PRESENTED . . . . . i

TABLE OF AUTHORITIES . . . . . iv

OPINIONS BELOW . . . . . 1

JURISDICTION . . . . . 1

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED . . . . . 1

STATEMENT . . . . . 1

REASONS FOR GRANTING THE WRIT . . . . . 7

Whether Unconstitutional Compulsion May Result From Prison Conditions That Are Not Atypical Is An Important Issue That Merits This Court's Attention . . . . . 8

A. The Tenth Circuit's Decision That Unconstitutional Compulsion May Result From Prison Conditions That Are Not Atypical Is Contrary To This Court's Recent Decisions . . . . . 8

B. The Tenth Circuit's Decision Conflicts With The Decisions Of Other Circuits And A Decision Of The Kansas Supreme Court . . . . . 11

C. The Tenth Circuit's Decision Provides This Court With An Opportunity To Consider Whether The *Turner v. Safley*, 482 U.S. 78 (1987), Balancing Test Applies In The Fifth Amendment Context . . . . . 13

## TABLE OF CONTENTS (con't)

Page

D. The Extent To Which Correctional Institution Privileges May Be Used To Encourage Inmates To Participate In Sex Offender Treatment Programs Is An Important Question . . . . . 15

CONCLUSION . . . . . 16

## TABLE OF AUTHORITIES

**Page**

**Cases**

*Asherman v. Meachum*, 957 F.2d 978 (2nd Cir. 1992) . . 11
*Bankes v. Simmons*, 265 Kan. 341, 963 P.2d 412 (1998) . . . . . 13
*Baxter v. Palmigiano*, 425 U.S. 308 (1976) . . . . . 9, 11
*Chambers v. Bachicha*, 39 F.3d 1191 (unpublished table decision), 1994 WL 596702 (10th Cir. 1994) . . . 12
*Dunn v. White*, 880 F.2d 1188 (10th Cir. 1989) . . . . . 14
*Foote v. Spiegel*, 995 F. Supp. 1347 (D. Utah 1998) . . . 14
*Gardner v. Broderick*, 392 U.S. 273 (1968) . . . . . 10, 12
*Garrity v. New Jersey*, 385 U.S. 493 (1967) . . . . . 10
*Guilkey v. Holden*, 865 F.2d 258 (unpublished table decision), 1988 WL 134526 (6th Cir. 1988) . . . . 11
*Johnston v. Simmons*, 45 F.Supp. 2d 1220 (D.Kan.1999) . . . . . 1
*Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977) . . . . . 8
*Lefkowitz v. Cunningham*, 431 U.S. 801 (1977) . . . . . 9
*Lefkowitz v. Turley*, 414 U.S. 70 (1973) . . . . . 10, 11
*Lile v. McKune*, 45 F. Supp. 2d 1157 (D. Kan. 1999) . . . 2
*Lile v. McKune*, 224 F.3d 1175, (10th Cir. 2000) . . . *passim*
*Martinez v. Aaron*, 570 F.2d 317 (10th Cir. 1978) . . . . . 2
*McMorrow v. Little*, 109 F.3d 432 (8th Cir. 1997) . . 10, 11
*Michenfelder v. Sumner*, 860 F.2d 328 (9th Cir. 1988) . 13
*Minnesota v. Murphy*, 465 U.S. 420 (1984) . . . . . 5, 8, 9,10
*Montana v. Imlay*, 506 U.S. 5 (1992) . . . . . 7, 9, 14
*Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998) . . . . . 5, 9
*Sandin v. Conner*, 515 U.S. 472 (1995) . . . . . 4, 8
*Searcy v. Simmons*, 97 F. Supp. 2d 1055 (D. Kan. 2000) . . . . . 9

*Tedder v. Francke*, 1991 WL 65497, 224 F.3d 1175 (9th Cir. 1991) . . . . . 11
Turner v. Safley, 482 U.S. 78 (1987) . . . . . 6, 13
*Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation*, 392 U.S. 280 (1968) . . . . . 10, 11
*Washington v. Harper*, 494 U.S. 210 (1990) . . . . . 14

**Constitutional Provisions and Statutes**

U.S. Const. amend. V . . . . . 1
28 U.S.C. § 1254(1) . . . . . 1

**Miscellaneous Authorities**

Brief of *Amicus Curiae* American Professional Society on the Abuse of Children Supporting Neither Party, *Montana v. Imlay*, 506 U.S. 5 (1992) (No. 91-687) . . . 15

## OPINIONS BELOW

The Oct 31, 2000, decision of the United States Court of Appeals for the Tenth Circuit is reported at 232 F.3d 901, and is included in the petition appendix. Pet. App. 3a-8a. The decision of the District Court is reported at 45 F.Supp. 2d 1220, and is also included in the petition appendix.

## JURISDICTION

This Court's jurisdiction to review the final judgment of the Tenth Circuit is invoked pursuant to 28 U.S.C. § 1254(1). The Tenth Circuit issued its decision in this case on Oct 31, 2000. This petition has been filed within ninety days of the latter date, as required by Supreme Court Rule 13.1.

## CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part that

> "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

U.S. Const. amend V.

Kansas Department of Corrections Internal Management Policy and Procedure 11-101 provides that

> "An inmate shall remain on Level III provided he . . . shall be automatically reduced to Level I for . . . [d]ocumented refusal to participate in work assignments or recommended programs . . . ."

## STATEMENT

1. *Nature of the Suit.* The Kansas Department of Corrections (KDOC) employs a comprehensive system of earnable inmate privileges in order to manage the offender population and reinforce constructive behavioral changes. As part of this system, inmates work their way through privilege incentive levels in accordance with their behavior, at all times

subject to reduction for disciplinary, work or recommended program infractions. Inmate Johnston, a convicted sex offender[1], filed this suit after he was reduced to Level I (from Level III) for refusing to participate in his recommended treatment program, the Sexual Abuse Treatment Program SATP), because it required him to accept responsibility for his sex crimes. Inmate Johnston claims his privilege reduction to Level I for refusing to accept responsibility in sex offender treatment violates his Fifth Amendment privilege against self-incrimination.

2. *The District Court.* The district court ordered a Martinez report, *see Martinez v. Aaron*, 570 F.2d 317 (10th Cir. 1978), and defendants then moved for summary judgment on all of Mr. Johnston's claims. Mr. Johnston filed an amended complaint on April 4, 1999, claiming that, by taking away his privileges and otherwise penalizing him for refusal to participate in the SATP, defendants (1) violated the prohibition on *ex post facto* laws contained in the United States Constitution, art. I, § 9, cl. 3; (2) improperly penalized him for exercising his right to freedom of speech under the First Amendment; (3) violated his Fifth Amendment due process rights by infringing on a liberty interest; (4) violated his Fifth Amendment right against self-incrimination; and (5) denied him due process under the Fourteenth Amendment. He sought declaratory and injunctive relief prohibiting recommendation of rehabilitative programs (and the penalties imposed by his refusal to participate) unless he voluntarily requested the program. The district court granted summary judgment to defendants on all claims. Pet. App. 9a-19a.

---

[1] Marvin W. Johnston is serving thirty-five years to life at Lansing Correctional Facility on convictions in 1979 for indecent liberties with a child, kidnapping, and sodomy. He is an habitual criminal, having previously been convicted for aggravated arson, burglary, and grand theft, and has spent all but sixteen of his fifty-nine years in prison. *State v. Johnston*, Sedgewick County, Kansas Case No. 79 CR 601.

3. *The Tenth Circuit.* The Tenth Circuit vacated a portion of the district court's judgment[2] and remanded to the district court with instructions to dismiss as moot all but the Fifth Amendment claim. Pet. App. 3a-8a. The Tenth Circuit held that *Lile v. McKune*, 224 F.3d 1175 (10th Cir. 2000) controls in this case and compels reversal of the district court's summary judgment in favor of the defendants on the Fifth Amendment issue. The Tenth Circuit began its Fifth Amendment analysis in *Lile* by briefly addressing the incrimination component of the privilege. *Id* at 1179. The Sexual Abuse Treatment Program requires participating inmates to complete a written sexual history and to sign an Acceptance of Responsibility form. Inmates are not given immunity from prosecution for any of their disclosures. The Tenth Circuit found that the incrimination element of the Fifth Amendment privilege was satisfied here for two reasons. First, the written sexual history might require persons such as inmate Lile to reveal uncharged sexual offenses. *Id.* Second, completion of the Acceptance of Responsibility form could subject inmates such as *Lile* to perjury charges for having maintained their innocence at trial. *Id.*

The Tenth Circuit then addressed the compulsion element of the privilege. *Id.* at 1180. The court began with an examination of the adverse consequences to an inmate for refusing to accept responsibility or provide a written sexual history. Observing that inmate Lile faced transfer to maximum security (from medium security) if he failed to comply with the SATP requirements, the court noted that such a "transfer would restrict [inmate Lile's] privileges."

---

[2] This result renders it unnecessary to reach the other issues raised by Mr. Johnston, including the interplay between Kan.Admin.Reg. S 44-5-105(c)(1) and IMPP 11-101.

> Specifically, he [inmate Lile] would lose his personal TV; he would have limited access to prison organizations and activities and would be unable to participate in the IMPP [the prison's Internal Management Policies and Procedures programs]; he would have limited access to the gym and yard area; there would be a substantial reduction in the amount of money he could spend in the canteen per pay period, from $140 per payroll . . . to $20 per payroll . . .; he would receive a reduction in pay and intake property; and he would have substantially restricted visitation privileges.

*Id.*

The Tenth Circuit, however, concluded that Lile would not be denied parole nor lose any good time credits because he refused to participate in the SATP. *Id* at 1180-82. The Tenth Circuit thus concluded that the only adverse consequences inmate Lile would suffer for refusing to participate in the SATP would be "transfer to maximum security prison and the resulting loss of privileges." *Id.* at 1182. According to the court, "[t]he critical question, then, is whether the State's imposition of these consequences in response to [inmate Lile's] invocation of his Fifth Amendment right against self-incrimination constitutes impermissible compulsion." *Id.*

In resolving the compulsion issue, the Tenth Circuit opined that "[t]here is no single test or factor that is dispositive, so we begin by examining Defendants' arguments." *Id.* at 1183. The court first addressed the argument that there is no compulsion here because inmate Lile's loss of privileges implicates no protected liberty interest under *Sandin v. Conner*, 515 U.S. 472 (1995). Although recognizing that changes in an inmate's prison classification ordinarily do not deprive him of a liberty interest, the Tenth Circuit opined that "nowhere in the relevant jurisprudence does the Supreme Court even hint that an individual attempting to show a violation of his Fifth Amendment privilege must have a protected liberty interest for

compulsion to occur." *Id.* at 1184. Rather, the court held that "[c]ompulsion can be established by hardships that may not be atypical and that do not constitute enforceable liberty interests." *See also id.* at 1184. ("It is clear that the compulsion element of a Fifth Amendment claim can be established by penalties which do not constitute a deprivation of protected liberty interests under the due process clause"). *Id.*

The Tenth Circuit then asserted that the "next critical question is whether the consequences imposed constitute penalties that are sufficiently potent and substantial to implicate the Fifth Amendment." *Id.* at 1185. Reviewing again the changes in privileges that would accompany a move from maximum to medium security (including loss of a personal TV), the Tenth Circuit concluded that "these deprivations and changes in environment are penalties sufficient to implicate the Fifth Amendment because they have substantial or potent effects on the inmate." *Id.* In reaching that conclusion, the court emphasized that a critical factor is that refusal to participate in the SATP, "standing alone," results in the loss of privileges. *Id.*

The Tenth Circuit next considered the argument that there is no compulsion because participation in the SATP is voluntary and changing inmate Lile's privileges when he refused to participate is the *withholding of a privilege* rather than the imposition of punishment. *Id.* at 1186. The court opined that the fact that the change in privileges in this case automatically followed refusal to participate in the SATP undermined the argument that participation "is truly voluntary." *Id.* In supporting that conclusion, the Tenth Circuit distinguished *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998) (inmate invoked privilege in clemency proceeding), and *Minnesota v. Murphy*, 465 U.S. 420 (1984) (person on probation claimed privilege)—both of which found no Fifth Amendment violation or compulsion—as cases in

which the person was not "punished or penalized *solely* for choosing to remain silent." *Id.* at 1187.

The Tenth Circuit then turned to "[t]wo additional considerations" that it opined might be helpful in determining what constitutes compulsion. *Id.* at 1188. "The first is a distinction between a privilege and a penalty." *Id.* Acknowledging that such a distinction exists and that it may have constitutional significance in this context, the Tenth Circuit nonetheless concluded that inmate Lile's loss of privileges in this case is "properly characterized as imposing penalties." *Id.*

The Tenth Circuit also considered "the automaticity of the penalty." *Id* at 1189. Again, the court opined that Supreme Court decisions finding no compulsion in the context of probation, parole or clemency, all involved situations in which adverse consequences for remaining silent were not "automatic." *Id.* Thus, the court concluded that "the State has violated [inmate Lile's] Fifth Amendment right against self-incrimination." *Id.*

Lastly, having found a constitutional violation, the Tenth Circuit applied the balancing test of *Turner v. Safley*, 482 U.S. 78 (1987), which requires an assessment of "whether the prison policy at issue 'is reasonably related to legitimate penological interests.'" *Id* at 1190 (quoting *Turner*). The Tenth Circuit recognized that the state has legitimate interests in the public safety and rehabilitating sex offenders. *Id.* at 1191. The court also recognized that

> [t]here is a rational connection between the policy of having prisoners admit responsibility for their offenses and disclose their sexual history in order to participate in the SATP and the legitimate governmental interest in rehabilitation of sex offenders. In fact, most mental health experts agree that a "sex offender must admit his guilt for treatment and rehabilitation to be successful."

*Id.* (internal citations omitted).

Nonetheless, the Tenth Circuit concluded that the balancing of interests favors inmate Lile, because (1) "there is no evidence that [inmate Lile] has any alternative means of exercising his Fifth Amendment right," *Id.* at 1191, "there is no evidence that accommodation of the right would have any negative effect on guards, other prisoners, or prison resources," and (3) the alternative to the policy would be to grant immunity or privilege any statements disclosed by the inmate. Asserting that the state could still prosecute inmate Lile for other sex crimes—it just could not use any statements he made in the SATP—the Tenth Circuit concluded that "the *Turner* balancing easily weighs in favor of [inmate Lile]." *Id.* at 1192.

## REASONS FOR GRANTING THE WRIT

The issue whether a State may withdraw privileges from a convicted sex offender for refusing to participate in a treatment program and accept responsibility for his crimes is one this Court decided to review previously, but the procedural posture of that earlier case ultimately prevented the Court from reaching the merits. *See Montana v. Imlay*, 506 U.S. 5 (1992) (dismissing the case because the offender would serve the same term of imprisonment regardless of the Court's resolution of the merits). Justice White, in his dissent from the dismissal, noted that:

> In the decision below, the Montana Supreme Court held that, "absent any grant of immunity" from prosecution for incriminating statements made during therapy, the Fifth Amendment "prohibit[s] augmenting a defendant's sentence because he refuses to confess to a crime or invokes his privilege against self-incrimination." The constitutional question is an important one and the decision below places the Montana Supreme Court in conflict with other courts.

506 U.S. at 6.

The Court should take this opportunity to address the important constitutional question left unanswered in *Imlay*. The issue is cleanly presented in this case, there is no danger of mootness, the Tenth Circuit ruling in *Lile v. McKune*, 224 F.3d 1175 (10th Cir. 2000) which controls in this case addresses the substantive issue at length in its opinion, and the Tenth Circuit's resolution of the issue is inconsistent with both this Court's and other courts' decisions. Indeed, this Court's decisions since it dismissed *Montana v. Imlay* almost ten years ago have strengthened the State's argument that the policy at issue here does not violate the Fifth Amendment.

**Whether Unconstitutional Compulsion May Result From Prison Conditions That Are Not Atypical Is An Important Issue That Merits This Court's Attention.**

**A. The Tenth Circuit's Decision That Unconstitutional Compulsion May Result From Prison Conditions That Are Not Atypical Is Contrary To This Court's Recent Decisions.**

In *Sandin v. Conner*, 515 U.S. 472 (1995), this Court recognized that "prisoners do not shed all constitutional rights at the prison gate, but '[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Id.* at 485 (internal citation omitted) (quoting *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977)). Consequently, this Court held that prison officials could place a prisoner in disciplinary segregation for thirty days without providing procedural due process because such segregation did not impose an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 484. In other words, when an inmate has no constitutionally protected right to, or liberty interest in, a particular housing level, his constitutional rights cannot be violated when that housing level is changed.

Reducing prison privileges—in which an inmate has no constitutionally protected liberty interest—for failing to accept responsibility in treatment is not compulsion under the Fifth Amendment. This Court has held that neither (1) the threat of a reduced opportunity for clemency, *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998), (2) the threat of revocation of parole, *Minnesota v. Murphy*, 465 U.S. 420 (1984), nor (3) the threat of adverse inferences being drawn at a prison disciplinary hearing, *Baxter v. Palmigiano*, 425 U.S. 308 (1976), constitute compulsion under the Fifth Amendment. Nonetheless, the Tenth Circuit held in this case that the threat of a reduction in institutional privileges constitutes compulsion under the Fifth Amendment.

In *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), this Court held that a death row inmate could be forced to choose between incriminating himself or having adverse inferences drawn from his silence at his clemency interview. Despite the fact that "[i]n *Woodard*, plaintiff did not face a possible loss of privileges and benefits, but rather a possible loss of life," *Searcy v. Simmons*, 97 F. Supp. 2d 1055, 1059 (D. Kan. 2000), the Tenth Circuit ruling in *Lile v. McKune*, 224 F.3d 1175 (10th Cir. 2000) which controls in this case distinguished *Woodard*, opining that "Mr. Woodard was not being punished for invoking the Fifth Amendment privilege."

In *Minnesota v. Murphy*, 465 U.S. 420 (1984), this Court held that the Fifth Amendment was not violated when a parolee was questioned by his parole officer about prior criminal activity after having been told that failure to be truthful could result in revocation of parole. In *Lile*, the Tenth Circuit relied on a footnote in *Murphy* in which this Court opined that "a state may validly insist on answers to even incriminating questions . . . as long as it recognizes that the required answers may not be used in a criminal proceeding." *Id.* at 435 n.7. However, Justice White, author of *Murphy*, later declared that any "assumption that this Court's decision in *Minnesota v.*

*Murphy* mandates . . . immunity from prosecution based upon incriminating statements made to a therapist . . . reflect a possible misunderstanding of [a State's] obligations under the law." *Montana v. Imlay*, 506 U.S. at 8 (White, J., dissenting from dismissal of writ of certiorari as improvidently granted). *Cf. McMorrow v. Little*, 109 F.3d 432, 436 (8th Cir. 1997) ("[*Minnesota v. Murphy*] does not, however, overrule the Court's earlier cases that state that the government can penalize someone for refusing to cooperate on government matters, even when the person does so by invoking his privilege against self-incrimination") (citing *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977); *Lefkowitz v. Turley*, 414 U.S. 70, 84 (1973); *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation*, 392 U.S. 280, 284 (1968); *Gardner v. Broderick*, 392 U.S. 273, 278-79 (1968); *Baxter v. Palmigiano*, 425 U.S. 308, 320 (1976)).

Finally, in *Baxter v. Palmigiano*, 425 U.S. 308 (1976), the Court held that negative inferences could be drawn from an inmate's silence in a prison disciplinary hearing without violating the Fifth Amendment, in part because "[d]isciplinary proceedings in state prisons . . . involve the correctional process and important state interests other than conviction for crime." *Id.* at 319. The Tenth Circuit ruling in *Lile v. McKune*, 224 F.3d 1175 (10th Cir. 2000) which controls in this case, however, distinguished *Baxter*, opining that "[h]ere, unlike in *Baxter*, Plaintiff's refusal to submit to the interrogation . . . standing alone, would certainly result in the [adverse consequences]." In *Baxter* the Court declared that

> [i]t is thus undisputed that an inmate's silence in and of itself is insufficient to support an adverse decision by the Disciplinary Board. In this respect, this case is very different from the circumstances before the Court in the Garrity-Lefkowitz decisions, where refusal to submit to interrogation and to waive Fifth Amendment privilege, standing alone and without regard to the other evidence,

> resulted in loss of employment or opportunity to contract with the State.

425 U.S. at 317-18 (citing *Garrity v. New Jersey*, 385 U.S. 493 (1967) (holding that police officers questioned concerning alleged fixing of traffic tickets in their boroughs could not be threatened with loss of employment for refusing to answer); *Lefkowitz v. Turley*, 414 U.S. 70 (1973) (holding that statute precluding award of government contract to any person refusing to answer questions concerning state contract violated the Fifth Amendment)).

The Tenth Circuit's analysis ignores the fact that it is not inmate Johnston's silence alone but rather his conviction of a sexual offense, plus the recommendation for treatment, plus his refusal to participate in that treatment which results in adverse consequences. Seen in this light, this case is much more similar to *Baxter* than to either *Garrity* or *Lefkowitz*. *See Asherman v. Meachum*, 957 F.2d 978, 982 (2nd Cir. 1992) ("The fact that a public employee might face the unpleasant choice of surrendering his silence or losing his job is no bar to an adverse consequence so long as the consequence is imposed for failure to answer a relevant inquiry and not for refusal to give up a constitutional right") (citing *Gardner v. Broderick*, 392 U.S. 273, 278-79 (1968); *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation*, 392 U.S. 280, 284 (1968)); *McMorrow v. Little*, 109 F.3d 432, 436 (8th Cir. 1997) ("[P]rison officials may constitutionally deny benefits to a prisoner who, by invoking his privilege against self-incrimination, refuses to make statements necessary for his rehabilitation, as long as their denial is based on the prisoner's refusal to participate in his rehabilitation and not his invocation of his privilege")).

### B. The Tenth Circuit's Decision Conflicts With The Decisions Of Other Circuits And A Decision Of The Kansas Supreme Court.

The Tenth Circuit ruling in *Lile v. McKune*, 224 F.3d 1175, 1180 (10th Cir. 2000) which controls in this case recognized that other courts would disagree with its *Sandin* analysis in this case, citing the following:

> But *cf. Tedder* [*v. Francke*], 1991 WL 65497, at *2 [(9th Cir. 1991)] (holding that Oregon sex offender program did not violate plaintiff's right against self-incrimination in part because he has no constitutional right to discretionary parole before the expiration of his sentence); *Guilkey v. Holden*, 865 F.2d 258, 1988 WL 134526 (6th Cir. 1988) (Table) (affirming district court determination that Fifth Amendment right against self-incrimination was not violated because plaintiff had no constitutionally protected liberty interest in discretionary parole).

*Id.*

Indeed, the Tenth Circuit had to distinguish its own precedent in finding compulsion in this case: "To the extent that [our decision in] *Chambers* may be interpreted as a rule that compulsion can occur only where one is forced to forgo a constitutional right or a liberty interest, we are not bound to follow it here." 224 F.3d at 1185 (citing *Chambers v. Bachicha*, 39 F.3d 1191 (unpublished table decision), 1994 WL 596702, at *3 (10th Cir. 1994) (finding it "dispositive of our inquiry that there is no compulsion for Fifth Amendment purposes . . . [because] Appellant has no right to earned time").

The Tenth Circuit's holding in this case also conflicts with the Kansas Supreme Court's explicit conclusion that

> The housing assignment given to an inmate, his or her custody classification, granting of parole, spending limitations at a canteen, regulation of visiting hours,

> withholding of good time awards, and regulation of other daily activities which are not atypical and do not pose a significant hardship within a prison, do not involve a liberty interest or violate the defendant's Fifth Amendment right by compelling him to incriminate himself and participate in SATP.

*Bankes v. Simmons*, 265 Kan. 341, 351, 963 P.2d 412, 420 (1998). The Tenth Circuit's response to that decision ruling in *Lile v. McKune*, 224 F.3d 1175 (10th Cir. 2000) which controls in this case is that "the liberty analysis should not be part of a Fifth Amendment privilege case." Pet. App.

The Tenth Circuit's decision conflicts with the decisions of other Circuits and the Supreme Court of Kansas, and the constitutional question presented is an important one that warrants resolution by this Court.

### C. The Tenth Circuit's Decision Provides This Court With An Opportunity To Consider Whether The *Turner v. Safley*, 482 U.S. 78 (1987), Balancing Test Applies In The Fifth Amendment Context.

In *Turner v. Safley*, 482 U.S. 78 (1987), the Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 89. The Court then set out the following "factors that are relevant in determining the reasonableness of the regulation at issue": (1) whether there is a valid, rational connection between the prison regulation or practice and a legitimate governmental interest; (2) whether the regulation or practice allows inmates an alternative means of exercising the subject constitutional right; (3) the impact of accommodation of the asserted right on guards, other inmates, and the allocation of resources generally; and (4) the absence of ready alternatives to the regulation or practice. *Id.* at 89-91.

After finding a Fifth Amendment violation in *Lile v. McKune*, 224 F.3d 1175 (10th Cir. 2000) which controls in this case this case, the Tenth Circuit applied the *Turner* balancing test and found that it "easily" weighed in favor of inmate Lile. However, it may be inappropriate to apply the *Turner* factors in the Fifth Amendment context. *Turner* involved claims under the First Amendment and the constitutional right to marry. Courts, including the Tenth Circuit itself, have recognized that application of the factors set forth in *Turner* to other constitutional claims may be inappropriate. *See, e.g., Dunn v. White*, 880 F.2d 1188, 1194 n.3 (10th Cir. 1989) ("The *Turner* test appears analytically to have only limited applicability to a prisoner's fourth amendment challenge"); *Michenfelder v. Sumner*, 860 F.2d 328, 331 (9th Cir. 1988) (noting that the second *Turner* factor is "much more meaningful in the first amendment context than the fourth, where the right is to be free from a particular wrong"); *see also Foote v. Spiegel*, 995 F. Supp. 1347, 1349 n.2 (D. Utah 1998) ("After careful consideration, this court determines that the Supreme Court's decision in *Washington* only commands use of the *Turner* 'standard of review' (i.e. reasonableness instead of strict scrutiny) when assessing prisoners' or detainees' constitutional claims; it does not command the use of the *Turner* factors themselves") (citing *Washington v. Harper*, 494 U.S. 210 (1990)).

It does not appear that this Court has ever applied *Turner* to a case involving the Fifth Amendment. Thus, this case presents the Court with an opportunity to address whether, and if so how, the *Turner* balancing test and factors apply to inmates' Fifth Amendment claims.

### D. The Extent To Which Correctional Institution Privileges May Be Used To Encourage Inmates To Participate In Sex Offender Treatment Programs Is An Important Question.

As noted above, the Court previously granted review in a case raising many of these issues in the related context of probation. At that time, one neutral *amicus* pointed out the importance of incentives for effective sex offender treatment:

> Denial is a common phenomenon in offender treatment. As treatment has become more sophisticated, methods for overcoming denial and encouraging honesty have been developed. Certain offenders continue to deny the abuse, however, despite the best efforts of therapists . . . . Efforts to provide meaningful offender treatment will be severely undermined unless offenders can be required to admit the abuse as a precondition to treatment, and unless failure to admit can lead to termination of treatment and revocation of probation or parole.

Brief of *Amicus Curiae* American Professional Society on the Abuse of Children Supporting Neither Party at 2, 8, *Montana v. Imlay*, 506 U.S. 5 (1992) (No. 91-687).

Prison administrators need a definitive answer to the question presented in this case, in order to determine how best to protect the public safety and to manage their growing sex offender populations. Treatment programs have proven effective, but they will be much less so absent strong incentives for inmates to participate. A decision in this case by this Court will affect potentially thousands of inmates and directly implicates the public safety.

## CONCLUSION

For the foregoing reasons, Kansas respectfully requests that the Court grant this petition for a writ of *certiorari*.

Respectfully submitted,

TIMOTHY G. MADDEN
*Chief Legal Counsel*
Kansas Department
of Corrections
900 S.W. Jackson
Topeka, KS 66612-1284
(785) 296-3317

CARLA J. STOVALL
*Attorney General*
STEPHEN R. MCALLISTER
*State Solicitor*
(Counsel of Record)
120 S.W. 10th Avenue,
2nd Floor
Topeka, KS 66612-1597
(785) 296-2215

January, 2001

# APPENDIX

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

---

| | |
|---|---|
| MARVIN W. JOHNSTON,<br><br>Plaintiff - Appellant,<br><br>v.<br><br>CHARLES SIMMONS,<br>Secretary of Corrections,<br>DAVID MCKUNE,<br><br>Defendants - Appellees. | No. 99-3193 |

---

ORDER

Filed November 29, 2000

---

Before **TACHA**, **ANDERSON**, and **LUCERO**, Circuit Judges.

---

This matter is before the court on appellee's motion to stay the mandate. The request is granted. The stay shall be in effect for ninety days from today's date, unless a petition for certiorari is filed in the United States Supreme Court. In the

event, the stay shall remain in effect until the Supreme Court's final disposition. *See Fed. R. App P. 41(d)(2)(B).*

Entered for the Court
PATRICK FISHER, Clerk of Court

S/
by:
Deputy Clerk

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

---

| | |
|---|---|
| MARVIN W. JOHNSTON,<br><br>Plaintiff - Appellant,<br><br>v.<br><br>CHARLES SIMMONS, Secretary of Corrections, and DAVID MCKUNE,<br><br>Defendants - Appellees. | No. 99-3193<br>(D.C. No. 97-CV-3354-KHV)<br>(D. Kan.) |

---

**ORDER AND JUDGMENT***

Filed Oct. 31, 2000

---

Before **TACHA**, **ANDERSON**, and **LUCERO**, Circuit Judges.

---

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Marvin W. Johnston appeals from summary judgment granted in favor of Charles Simmons, Secretary of Corrections for the State of Kansas, and David McKune, warden of the Lansing Correctional Facility, on Mr. Johnston's suit brought pursuant to 42 U.S.C. § 1983. Our jurisdiction arises under 28 U.S.C. § 1291, and we reverse.

## I. Facts and proceedings

The relevant facts are undisputed. Mr. Johnston is serving thirty-five years to life at Lansing Correctional Facility on convictions in 1979 for indecent liberties with a child, kidnapping, and sodomy. He is an habitual criminal, having previously been convicted for aggravated arson, burglary, and grand theft, and has spent all but sixteen of his fifty-nine years in prison. *See* R. Doc. 10, Ex. 4 & 5.

In 1988 the Kansas legislature enacted legislation requiring inmates and the secretary of corrections to enter into written agreements that specified the programs the secretary determined the inmate must satisfactorily complete in order to be prepared for release on parole or post-release supervision. *See* Kan. Stat. Ann. § 75-5210a; *Payne v. Kansas Parole Bd.*, 887 P.2d 147, 150 (Kan. Ct. App. 1994). For those inmates incarcerated prior to enactment of that statute and therefore not covered by its mandatory provisions, *see Payne*, 887 P.2d at 150 (holding that § 75-5210a does not apply retroactively), Kansas administrative regulations provide for voluntary entrance into a rehabilitative program plan. *See* Kan. Admin. Reg. § 44-5-105(c)(2). The regulations specifically provide that inmates "shall not be penalized for refusal to participate in a formal program plan." § 44-5-105(c)(1). These regulations

"have the force and effect of law in Kansas." *Stansbury v. Hannigan*, 960 P.2d 227, 234 (Kan. 1998).

In 1989 Mr. Johnston was offered an opportunity to participate in a rehabilitation program that included sex offender counseling. He refused, acknowledging that his refusal would "likely have an adverse effect on [his] chance to be granted parole." R. Doc. 28, Ex. C. In March 1994, after his first parole hearing, Mr. Johnston was denied parole because of the serious nature and circumstances of the crime, his history of criminal activities, his non-participation in programs, and his number of times in prison. *See* R. Doc, 10, Ex. 1. In January 1996, the Kansas Department of Corrections adopted amended Internal Management Policy and Procedure (IMPP) 11-01, which provides a system of privileges and incentives as well as disciplinary measures for inmates. At its initiation, all inmates were placed at the highest level of privileges and incentives (Level III), which gave them "the same privileges that existed prior to implementation of IMPP 11-101." *See Id.* at 237. Despite the express prohibition on penalties pronounced in § 44-5-105(c)(l), however, IMPP 11-101 provides for reduction to Level 1 for those inmates who refuse to participate in a "recommended" program at the time of placement. *See* R. Doc. 10, Ex. 11 at IV(B)(2).

By 1995 Mr. Johnston had completed recommended educational and vocational programs and was waiting to get into recommended mental health counseling. *See* R. Doc. 10, Ex. 9. In 1995 and again in 1996, Mr. Johnston was asked to voluntarily enroll in the Sexual Abuse Treatment Program (SATP).[1] The SATP requires inmates to sign a form stating that the program is voluntary, to sign a waiver of confidentiality, to prepare a complete written sexual history

---

[1] In 1995 the treatment program was called the Sex Offender Treatment Program, or SOTP. Because it is now called the SATP, we refer to it as such in this order and judgment.

that includes uncharged sex crimes, and to take a polygraph examination to verify the truthfulness of the sexual history. He refused the program in 1995, with the understanding that failure to participate in it would result in withholding of good time credits that would affect his date of release. *See Id.* In 1996, after the new penalties were adopted by IMPP 11-101, Mr. Johnston agreed to sign papers committing him to the SATP program in order to avoid being automatically punished for refusing a program. *See id.* Ex. 14. Because he would only sign the papers "under duress," the prison staff considered his behavior to be "a refusal." *Id.* Ex. 12. Mr. Johnston wrote a letter to his unit manager, explaining that he had no desire to be paroled and that he had informed the parole board of that fact in 1994. *See id.* Ex. 14. He requested that his unit manager recommend termination of the program participation requirement as a term of staying at privilege Level III. *See id.* His request was denied, and, as a result of his refusal in 1996 to participate in the SATP, his privileges were reduced to Level I and he was terminated from his place of employment and not allowed to work for 90 days. *See* R. Doc. 5, Ex. 1 at 1.

On March 5, 1997, Mr. Johnston was again denied parole for the same reasons as stated in 1994 and because of his "objections regarding parole." *See id.*, Doc. 10, Ex. 2. His next parole hearing was deferred for six years (until 2003) because it was "not reasonable to expect that parole would be granted at a hearing if held before then [because Mr. Johnston] has an extensive history of crimes against people and children." *Id.* Mr. Johnston subsequently sent a letter to the Parole Board on March 19, 1997, asking it to "pass" on him to his conditional release date or at least twenty years because he did not desire parole. *See id.*, Ex. 3.

On August 15, 1997, Mr. Johnston filed suit under § 1983. *See Johnston v. Simmons*, 45 F. Supp. 2d 1220 (D. Kan. 1999). The district court ordered a *Martinez* report, *see*

*Martinez v. Aaron*, *570* F.2d 317 (10th Cir. 1978), and defendants then moved for summary judgment on all of Mr. Johnson's claims. Mr. Johnston filed an amended complaint on April 4, 1999, claiming that, by taking away his privileges and otherwise penalizing him for refusal to participate in the SATP, defendants (1) violated the prohibition on *ex post facto* laws contained in the United States Constitution, art. I, § 9, cl. 3; (2) improperly penalized him for exercising his right to freedom of speech under the First Amendment; (3) violated his Fifth Amendment due process rights by infringing on a liberty interest; (4) violated his Fifth Amendment right against self-incrimination; and (5) denied him due process under the Fourteenth Amendment. *See* R. Doc, 25, at 3-4a. He sought declaratory and injunctive relief prohibiting recommendation of rehabilitative programs (and the penalties imposed by his refusal to participate) unless he voluntarily requested the program. *See id.* at 5. The district court granted summary judgment to defendants on all claims.

## II. Standard of review

We review the district court's grant of summary judgment de novo. *See McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125, 1128 (l0th Cir. 1998). In conducting that review, "[w]e examine the record to determine whether any genuine issue of material fact was in dispute; if not, we determine whether the substantive law was applied correctly, and in so doing we examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing the motion." *Id.* (quotations omitted).

## III. Discussion

In *Lile v McKune*, 224 F.3d 1175, Nos. 98-3292, 98-3294, 2000 WL 1260284 (10th Cir. Sept. 5, 2000), we held that the Kansas sexual abuse treatment program for prisoners violates the Fifth Amendment rights of inmates who are not granted immunity, or otherwise guaranteed confidentiality, for

disclosing prior sex crimes. *Lile* controls in this case and compels reversal of the district court's summary judgment in favor of the defendants on the Fifth Amendment issue.[2]

This result renders it unnecessary to reach the other issues raised by Mr. Johnston, including the interplay between Kan. Admin. Reg. § 44-5-105(c)(1) and IMPP 11-101. However, see *Sandin v. Conner*, 515 U.S. 472, 484 (1995); *Meacham v. Fano*, 427 U.S. 215, 225 (1976); *Templeman* v. *Gunter*, 16 F.3d 367, 369 (10th Cir. 1994); and *Bankes v. Simmons*, 963 P.2d 412, 420 (Kan. 1998), comparing those cases *with Lile*, 2000 WL 1260284 at *6, which holds that "the compulsion element of a Fifth Amendment claim can be established by penalties which do not constitute the deprivation of protected liberty interests under the Due Process Clause." We vacate the portion of the district court's judgment relating to those issues and remand to the district court with instructions to dismiss as moot all but the Fifth Amendment claim.

The judgment of the United States District Court for the District of Kansas is REVERSED in part and VACATED in part and the case is REMANDED for further proceedings consistent with this order and judgment.

Entered for the Court

Stephen H. Anderson
Circuit Judge

---

[2] The State does not contend that Mr. Johnston had no concern regarding self-incrimination or that his opposition to signing up for the SATP program was wholly on other grounds.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF KANSAS**

| | | |
|---|---|---|
| **MARVIN W. JOHNSTON,** | ) | |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | **CIVIL ACTION** |
| **v.** | ) | |
| | ) | **No. 97-3354-KHV** |
| **CHARLES SIMMONS,** | ) | **Filed May 27, 1999** |
| | ) | |
| **Defendant.** | ) | |
| | ) | |

**MEMORANDUM AND ORDER**

This matter comes before the Court on defendant's *Motion For Summary Judgment* (Doc. # 17) filed January 21, 1999. Plaintiff brings suit under 42 U.S.C. § 1983, alleging that defendant violated his constitutional rights by reducing his incentive level when he refused to enter recommended rehabilitation programs at Lansing Correctional Facility. Plaintiff brings suit against defendant in his official capacity, seeking injunctive and declaratory relief, as well as litigation costs. For reasons stated below, the Court finds that defendant's motion is well taken and should be sustained.

**Facts**

Plaintiff an inmate at Lansing Correctional Facility, is serving 35 years to life for a 1979 conviction. Around April 18, 1989, defendant asked plaintiff to sign a program agreement which listed various programs that he would complete prior to parole. Plaintiff refused to sign such an agreement. Around April 20, 1995, plaintiff again refused to sign.

On January 1, 1996, the Department of Corrections adopted Internal Management Policy and Procedure ("IMPP") 11-101.

IMPP 11-101 provides a system of privileges and incentives for inmates who participate in rehabilitative programs and conduct themselves in an appropriate manner in accordance with the rules of Kansas correctional facilities. At the initia-tion of IMPP 11-101, all inmates were automatically placed in Level III, which grants the maximum allowable privileges. IMPP 11-101 provides that an inmate's privilege level should be automatically reduced to Level I if the inmate refuses to participate in recommended programs at the time of the placement screening process.

On August 21, 1996, April 29, 1997 and July 18, 1997, defendant provided plaintiff opportunities to sign a program agreement for enrollment in the Sex Offender Treatment Program ("SOTP") and other programs. Plaintiff refused to sign such agreements, knowing that if he refused to participate, defendant would reduce his privileges under IMPP 11-101 to Level I, where inmate access to certain personal belongings is restricted. As a result of plaintiff's refusal to enter into and complete the recommended rehabilitative programs, defendant reduced plaintiff's incentive level under IMPP 11-101. Plaintiff has never entered into a program plan.

The SOTP program requires inmates to sign (1) a form stating that the program is voluntary, (2) a waiver of confidentiality form, and (3) a written sexual history which includes any uncharged sex crimes. An inmate must also take a polygraph examination to verify the truthfulness of the sexual history.

**Summary Judgment Standard**

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,

247 (1986); *Vitkus v. Beatrice Co.*, 11 F.3d. 1535, 1538-39 (10th Cir 1993). A factual dispute is "material" only if it "might affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248. A "genuine" factual dispute requires more than a mere scintilla of evidence. *Id.* at 252. The moving party bears the initial burden of showing that there is an absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Hicks v. City of Watonga*, 942 F.2d 737, 743 (10th Cir. 1991). Once the moving party meets its burden, the burden shifts to the nonmoving party to demonstrate that genuine issues remain for trial "as to those dispositive matters for which it carries the burden of proof." *Applied Genetics Int'l, Inc. v. First Affiliated Securities, Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990); *see also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991). The nonmoving party may not rest on its pleadings but must set forth specific facts. *Applied Genetics*, 912 F.2d at 1241.

"[W]e must view the record in a light most favorable to the parties opposing the motion for summary judgment." *Deepwater Invs., Ltd. v. Jackson Hole Ski Corp.*, 938 F.2d 1105, 1110 (10th Cir. 1991). Summary judgment may be granted if the non-moving party's evidence is merely colorable or is not significantly probative. *Anderson*, 477 U.S. at 250-51. "In a response to a motion for summary judgment, a party cannot rely on ignorance of facts, on speculation, or on suspicion, and may not escape summary judgment in the mere hope that something will turn up at trial." *Conaway v. Smith*, 853 F.2d 789, 793 (10th Cir. 1988). Essentially, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52.

**Analysis**

In his amended complaint (Doc. # 25), plaintiff brings five claims. Plaintiff claims that defendant's actions (1) violate the prohibition on *ex post facto* laws, U.S. Const., art. 1, § 9, cl. 3, art. 1, § 10, cl. 1; (2) penalize him for exercising his right to freedom of speech under the First Amendment; (3) violate his Fifth Amendment due process rights by infringing on a liberty interest; (4) violate his right against self-incrimination under the Fifth Amendment; and (5) deny him due process under the Fourteenth Amendment.

**1. *Ex Post Facto***

"An ex post facto law is 'any law which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.'" *Raymer v. Enright*, 113 F.3d 172, 174 (10th Cir. 1997) (quoting *Weaver v. Graham*, 450 U.S. 24, 28 (1981)). In determining whether a rule violates the *ex post facto* clause, the Court focuses on whether the change alters the definition of criminal conduct or increases the penalty by which a crime is punishable. *See California Dep't. of Corrections v. Morales*, 514 U.S. 499, 506-07 n.3 (1995).

The Court has considered plaintiff's *ex post facto* argument in ruling on plaintiffs motion for preliminary injunction. *See Johnston v. Simmons*, ___ F. Supp. 2d ___, 1999 WL 203488 (D. Kan. Mar 31, 1999). Plaintiff argues that K.S.A. § 75-5210a, Kansas Administrative Regulation ("K.A.R.") 44-5-105 and IMPP 11-101 violate the prohibition on *ex post facto* laws because defendant is using them to require him to complete recommended programs as a condition of parole. Section 75-5210a directs the Secretary of Corrections to enter into inmate program agreements that list the programs that particular inmates must complete to be prepared for release on parole. Section 22-3717(g)(2) states that to be eligible for parole, an inmate must complete the programs listed in his

program agreement under Section 75-5210a. Plaintiff argues that such programs were not a condition for parole when he entered prison in 1979 and that defendant has increased his penalty by adding requirements for parole that could lengthen his sentence. Neither Section 22-3717 nor Section 75-5210a applies to plaintiff; however, because plaintiff was incarcerated in 1979 and the Kansas legislature enacted these provisions in 1988. Under Kansas law, the statutes are not retroactive. *See Payne v. Kansas Parole Bd.*, 20 Kan. App. 2d 301, 304, 887 P.2d 147, 151 (1994).

Plaintiff argues that defendant is coercing him into signing a program plan under K.A.R. 44-5-105. Under K.A.R. 44-5-105, inmates who are not covered by the requirements of Section 75-5210a can voluntarily enter into a program plan. *See* K.A.R. 44-5-105(c)(1). Plaintiff argues that defendant equates program plans under K.A.R. 44-5-105 and program agreements under Section 75-5210a. Plaintiff therefore reasons that if he signs a program plan, he will not be eligible for parole until he completes the programs listed in the plan. *See* K.S.A. § 2217 17(g)(2).

As plaintiff concedes, however, a program plan under K.A.R. 44-5-105 is voluntary. Plaintiff is not required to enter into a program plan. Plaintiff apparently argues that his choice is not truly voluntary because he is forced to choose between signing a program plan or losing his privileges under IMPP 11-101. Plaintiff however, retains the power to choose whether to enter into a program plan. While his refusal has resulted in the loss of privileges under IMPP 11-101, this loss is not an *ex post facto* violation. *See Johnston*, 1999 WL 203488 at *3 (citing *Maberry v. McKune*, 24 F. Supp. 2d 1222, 1228 (D. Ken. 1998); *Vinson v. McKune*, 265 Kan. 422, 426, 960 P.2d 222, 224-25 (1998); *Nemechek v. McKune*, 24 Kan. App. 2d 72, 75, 941 P.2d 952, 954 (1997)). Plaintiff does not allege that IMPP 11-101 affects his eligibility for parole. His sentence is therefore no different than it was before

defendant applied IMPP 11-101. Plaintiff therefore has not shown a current injury for purposes of the *ex post facto* clause. The Court reiterates its earlier statement that

> [e]ven if defendants want plaintiff to sign a program plan, they have not required him to sign a plan. They have merely taken away his privileges for his refusal. Defendants have allowed plaintiff to make his own choice whether to sign a program plan. So long as plaintiff continues to fight the good fight (from his perspective) and refuses to sign a program plan, the law recognizes no *ex post facto* problem.

*Johnston*, 1999 WL at *4.[1] Because defendant's actions do not violate the *ex post facto* clause, defendant is entitled to summary judgment on plaintiff's *ex post facto* claim.

**2. Due Process[2]**

"The Fourteenth Amendment prohibits any State from depriving a person of life, liberty, or property without due process of law." *Perkins v. Kansas Dep't of Corrections*, 165 F.3d 803, 808 (10th Cir. 1999) (quoting *Meachum v. Fano*, 427 U.S. 215, 223 (1976)). A prisoner's liberty interests may arise either from the Due Process Clause itself or from state law. *Id.* Plaintiff argues that K.A.R. 44-5-105 conveys a liberty interest which entitles plaintiff to remain free of any requirement to complete rehabilitative programs. Even if K.A.R. 44-5-105 gave plaintiff such a right, the Court finds that this right does not constitute a constitutionally-protected

---

[1] At the time of our earlier decision, plaintiff's complaint named two defendants.

[2] Plaintiff's complaint brings separate procedural due process claims under the Fifth and Fourteenth Amendments. Courts apply the same standards to both, however, and the Court therefore treats both claims as one for purposes of this motion. *See Doyle v. Oklahoma Bar Ass'n*, 998 F.2d 1559, 1567 n.5 (10th Cir. 1993); *Packerware Corp. v. B & R Plastics, Inc.*, 15 F. Supp. 2d 1074, 1077 (D. Kan. 1998).

liberty interest. To implicate due process, state-created liberty interests are "generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995). In *Stansbury v. Hannigan*, 265 Kan. 404, 960 P.2d 227 (1998), the Kansas Supreme Court determined that application of IMPP 11-101 did not constitute an atypical and significant hardship on inmates. *Id.* at 421, 960 P.2d at 238. The Court agrees with the reasoning and analysis in *Stansbury* and finds that defendant's application of IMPP 11-101 to plaintiff did not violate due process, regardless of any rights he had under K.A.R. 44-5-105. *See also Gilmore v. McKune*, 23 Kan. App. 2d 1029, 1037, 940 P.2d 78, 84 (1997) (imposing penalty contrary to K.A.R. 44-5-105 permissible when penalty does not violate due process). Defendant is therefore entitled to summary judgment on plaintiffs due process claim.

**3. Freedom of Speech**

Plaintiff argues that his refusal to enter into a program plan constitutes protected speech under the First Amendment. The First Amendment protects the communication of ideas. *Bee v. Greaves*, 744 F.2d 1387, 1393-94 (10th Cir. 1984). Therefore, to implicate plaintiff's free speech rights, plaintiff must express an idea. *See Junger v. Daley*, 8 F. Supp. 2d 708, 716 (N.D. Ohio 1998). Plaintiff alleges that his speech consisted of refusing to say "yes" to requests that he sign a program plan.

While plaintiff's actions may have contained a speech element, plaintiff does not allege that he expressed any idea to defendant, other than simply refusing to participate. The Court does not believe that plaintiff's refusal to participate in the SOTP, whether communicated through speech or through conduct, merits First Amendment scrutiny in this context. As the Supreme Court has noted, "[i]t is possible to find some

kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at the shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). To determine whether plaintiffs refusal to participate implicates his right to free speech, we must determine whether the refusal constituted "activity [which] was sufficiently imbued with elements of communication." *Spence v. Washington*, 418 U.S. 405, 409 (1974).

It is not enough to simply show that plaintiff intended to communicate an idea. "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). For the First Amendment to apply to plaintiff's conduct, plaintiff must show both (1) an intent to convey a particularized message and (2) based on the surrounding circumstances, a great likelihood that prison officials would understand plaintiff's message. *Spence*, 418 U.S. at 411. Plaintiff does not allege that he intended to communicate any message to prison officials by refusing to participate in the SOTP program. Even if the Court assumes that plaintiff meant to convey deep opposition to the lawfulness of the program, his method of communicating this message—simply refusing to participate—does not suggest a great likelihood that prison officials would understand his meaning. The Court therefore finds that plaintiff's refusal to participate in the SOTP program did not implicate his right to free speech. Defendant is entitled to summary judgment on plaintiff's freedom of speech claim.[3]

---

[3] Plaintiff also argues that the application of IMPP 11-101 presents an unconstitutional condition because it requires him to choose between his right to free speech and the benefit of not losing his privileges. Because the Court finds that plaintiff's free speech rights are not implicated by his refusal to participate in the SOTP, plaintiff was not forced to choose

**4. Self-Incrimination**

Plaintiff claims that defendant's application of IMPP 11-101 violates his Fifth Amendment right not to incriminate himself Defendant reduced plaintiffs privileges under IMPP 11-101 because of plaintiff's refusal to enter the SOTP. As part of the sex offender program, participants must admit their sexual history, including any uncharged sex crimes. Inmates must then take a polygraph examination to ascertain the truthfulness of that history.

Two recent cases have addressed the incriminatory nature of the SOTP's requirements. In *Bankes v. Simmons*, 265 Kan. 341, 963 P.2d 412 (1998), the Supreme Court of Kansas found that the required admissions in the SOTP would violate plaintiff's right against self-incrimination if the state used plaintiff's admissions in a later criminal proceeding. *Id.* at 341, 963 P.2d at 419-20. There, plaintiff was forced to either admit his guilt or serve a longer sentence, because defendant withheld good time credits as a result of plaintiff's refusal to participate. *Id.* at 341, 963 P.2d at 420. The Kansas Supreme Court found, however, that the application of IMPP 11-101 to reduce plaintiff's incentive level, based on his refusal to participate, did not violate plaintiff's right against self-incrimination. *Id.*

Likewise, defendant points the Court to *Kirkpatrick v. Simmons*, Case No. 1996-3140-MLB, where the Honorable Monti L. Belot adopted the report and recommendation of Magistrate Karen M. Humphreys. In that case, Magistrate Humphreys found that because plaintiff's participation in the SOTP program was voluntary, plaintiffs right against self-incrimination was not infringed, despite defendant's use of

---

between his constitutional right and retaining his favorable incentive level. The doctrine of unconstitutional conditions does not apply. *See Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998) (constitutional right must be present before doctrine can apply).

IMPP 11-101 to reduce plaintiff's incentive level. *Report & Recommendation* (Doc. #25) filed June 12, 1998. Other courts have found that because of their voluntary nature, similar programs do not violate the right against self-incrimination. *See Amen-Ra v. Department of Defense*, 961 F. Supp. 256 (D. Kan. 1997); *Russell v. Eaves*, 722 F. Supp. 558, 560 (E.D. Mo. 1989).

In *Lile v. McKune*, 24 F. Supp. 2d 17152 (D. Kan. 1998), the Honorable Dale E. Saffels ruled exactly opposite of *Bankes* and *Kirkpatrick*, finding that application of IMPP 11-101 to an inmate who refuses to participate in the SOTP constitutes sufficient compulsion as to violate the inmate's right against self-incrimination. *See Lile*, 24 F. Supp. 2d at 1159. In the Court's view, *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272, 118 S. Ct. 1244 (1998), is highly instructive on the issue. There, a death row inmate was forced to either confess his guilt or face a reduced chance at clemency. The United States Supreme Court, however, rejected his Fifth Amendment claim, finding that the possible adverse consequences were not sufficient compulsion for purposes of the Fifth Amendment because the inmate retained his right to choose, and any incrimination was therefore voluntary. *Id.* at 1252-53,

One might argue that the Supreme Court in *Woodard* literally forced plaintiff to choose between life or death. It assumed that plaintiff's silence would result in a denial of clemency. *Id.* at 1253. Plaintiff could remain silent, yet lose any hope of clemency. On the other hand, he could confess his guilt in the hope of clemency. Even though the decision had extreme consequences, the Supreme Court found that it did not implicate plaintiff's right against self-incrimination because plaintiff retained the choice to incriminate himself or remain silent. *Id.*

The Court recognizes that Judge Saffels found that *Woodard* was consistent with his view that IMPP 11-101 was sufficient compulsion. *See Lile*, 24 F. Supp. 2d at 1158. Judge

Saffels based this opinion on the fact that plaintiff in *Woodard* apparently suffered no additional penalty by rejecting the clemency hearing. *See Lile*, 24 F. Supp. 2d at 1158. It is true that plaintiff in *Woodard* did not face a possible loss of privileges and benefits, but he was still faced with loss of his life. If such a choice is not sufficient compulsion to make incriminating statements involuntary, the application of IMPP 11-101, even in its most severe application, can hardly be sufficient.[4] Because plaintiff retained the right to choose whether to enter the SOTP, its requirements do not violate his right against self-incrimination, despite the reduction in privileges caused by IMPP 11-101.[5] Defendant is therefore entitled to summary judgment on plaintiff's self-incrimination claim.

IT IS THEREFORE ORDERED that defendant's *Motion For Summary Judgment* (Doc. # 17) filed January 21, 1999 be and hereby is SUSTAINED.

Dated this 26th day of May, 1999 at Kansas City, Kansas.

Kathryn H. Vratil
United States District Judge

---

[4] The Court notes that the grant of clemency is speculative, while the application of IMPP 11-101 is practically certain. The speculative nature of clemency, however, is not enough to convince the Court that IMPP 11-101 presents a more compulsive force when an inmate decides whether to incriminate himself.

[5] As noted above, the application of IMPP 11-101 is not an unconstitutional condition, because plaintiff's right against self-incrimination never arises due to the voluntary nature of the SOTP. *See Woodard*, 118 S. Ct. at 1252.